IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-6523

WILLIAM ROLAND ROBERTS,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

SIMON L. LEIS, JR.
Prosecuting Attorney

FRED J. CARTOLANO
First Assistant Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

420 Hamilton County Court House
Court & Main Streets
Cincinnati, Ohio 45202
Attorneys for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases cited:

Statutes cited:

Rules cited:

Constitutional provisions cited:

Text cited:

Miscellaneous:

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1976

No. 76-6523

WILLIAM ROLAND ROBERTS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

REPLY BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully submits that it is opposed to the issuance of a writ of certiorari in the within cause for the reason that the Ohio Supreme Court has decided the federal questions at issue in accord with the applicable decisions of this court.

OPINIONS BELOW

The Petition of the Petitioner correctly cites the opinion below. (Appendix C).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

The decisions, briefs and memorandum filed in the state courts in Petitioner's cases as they progressed from the Court of Common Pleas to the Supreme Court of Ohio reflect that Petitioner failed to raise any constitutional challenge to the Ohio statutory scheme which provides for the imposition of the death penalty. It is to be noted, however, that Petitioner did raise and preserve the questions presented in his questions II through V.

I. Whether this Court should decide federal questions raised here for the first time on review of state court decisions where Petitioner failed to raise or preserve such questions in the state courts.

II. Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the United States Constitution.

III. Whether a venireman, in a capital case, who is questioned during voir dire examination with respect to his attitude concerning capital punishment may be excused for cause where he unambiguously states he would be unable to join a verdict of guilty, in a proper case, where the death penalty could be imposed.

IV. Whether Petitioner's due process rights were violated where the trial court erred in favor of the Petitioner concerning the admissibility on an admission, and where the court instructs the jury that any statements of the court or counsel are not evidence and they are not to contemplate reasons for rulings on objections.

V. Whether the Petitioner's due process rights were violated where no objection was made to the trial court's instruction to the jury with respect to evidence of other acts.

VI. Whether the Petitioner's due process rights were violated where Petitioner made no objection to the trial court's jury instruction on the charge of aggravated murder.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Eighth and Fourteenth Amendments of the United States Constitution and Sections 2903.01, 2929.02, 2929.03 and 2929.04 of the Ohio Revised Code are set forth in Appendix A herein.

STATEMENT OF THE CASE

During the mid-afternoon of August 5, 1974, the Petitioner kidnapped William Henry Reed and his wife Norma from the banks of the Ohio River at Rising Sun, Indiana, and commanded them at gunpoint to accompany him to their home in Cincinnati, Ohio.

Following the Reeds and Petitioner in a rented Ford automobile was Patricia Sue Ramey who the Petitioner had kidnapped from Billings, Montana, and who the Petitioner had repeatedly threatened as they travelled across the country.

After entering the Reed residence through the rear entrance the Reed's were told to remain on the bed in the bedroom. Petitioner struck Mr. Reed demanding to know where his money was hidden. Mr. Reed went to the kitchen, obtained $30, and gave it to the Petitioner.

Next, Mr. Reed surrendered his handgun to the Petitioner. Still unsatisfied the Petitioner demanded more money. This time Mr. Reed went to the living room where he retrieved some more money from a record album.

Upon learning that the Reeds' had a basement, the Petitioner ordered them to go downstairs. Once they were in the basement the Petitioner hog-tied both Mr. and Mrs. Reed. The Petitioner tied Mrs. Reed to a gas pipe which was connected to the furnace and told her that if she moved it would cause an explosion. Mr. Reed was taken into the basement lavoratory and tied up in a sitting position on the toilet with ropes going over the rafter and pipe above his head. Both the Reeds were gagged and their mouths taped closed.

A further search of the upstairs rooms by the Petitioner resulted in his finding more money in a bureau in the living room. The fact that the Reeds had concealed this money from him made the Petitioner extremely angry. The Petitioner returned to the basement where he told Mr. Reed, "You are a damned liar, old man. There is more money up there than you said, and this is going to cost you your life". Next Mrs. Reed heard the Petitioner pull the rope with which her husband was tied. She heard her husband make the sound "ugh, ugh" and give his last breath. As he was exiting the basement the Petitioner struck Mrs. Reed and choked her by pulling the rope around her neck.

Mrs. Reed worked the gag from her mouth but it was not until the next morning before a next door neighbor heard her cries for help. The neighbor tried to help the Reeds and they also called the police. Upon discovering Mr. Reed in the basement lavoratory the neighbor slammed the door closed until the police arrived.

The autopsy performed on William Henry Reed revealed that the cause of death was asphyxiation due to ligature strangulation.

The Petitioner was eventually brought into custody on October 15, 1974, in Portland, Oregon. At the time he was interviewed by the Federal Bureau of Investigation agent the gun which he had taken from the Reed residence was recovered from Petitioner's possessions. During the interview the Petitioner informed the FBI agent that Patricia Sue Ramey had no part in any of the crimes which he had committed. Patricia Sue Ramey had been released by the Petitioner in late September, 1974, in Vernon, Alabama, when he left her tied to a motel bed.

Nine days after the initial FBI interview the Petitioner related what had occurred at the Reed's house on August 5, 1974, to another FBI agent, after the Petitioner had been fully advised of his constitutional rights. The Petitioner told the FBI agent that he had become angry because the Reeds had lied to him. The Petitioner also admitted that he had killed Mr. Reed.

After hearing all the evidence the jury returned a verdict finding the Petitioner guilty as charged on all counts of the indictment including aggravated murder and the specification.

The trial court ordered a pre-sentence investigation and psychiatric examinations as provided in the Ohio statutes. A mitigation hearing was conducted on July 3, 1975. The trial court found that none of the mitigating factors as set forth by statute were present and sentenced the Petitioner to death.

The conviction and sentence were affirmed by the Court of Appeals for the First Appellate District of Ohio, Hamilton County, on April 19, 1976. The Supreme Court of Ohio affirmed the conviction and sentence on December

15, 1976. Petitioner's motion for rehearing was denied by the Supreme Court of Ohio on January 14, 1977.

ARGUMENT

I.

Whether this Court should decide federal questions raised here for the first time on review of state court decisions where Petitioner failed to raise or preserve such questions in the state courts.

Petitioner has failed to raise or preserve the question of the constitutionality of Ohio's statutory scheme which provides for the imposition of the death penalty. The issue was never raised at trial or on appeal. For the first time Petitioner has raised the issue of constitutionality before this Court and asks that this Court grant a writ of certiorari to review the question.

In *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969) the Court stated, "It was very early established that the Court will not decide federal constitutional questions raised here for the first time on review of state court decisions," 394 U.S. at 438. This position has been reaffirmed numerous times by simply stating as the Court did in *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973), "We cannot decide issues raised for the first time here".

Respondent brings this issue to the Court's attention for the reason that it feels granting review based on questions presented by Petitioner's first question would only result in this Court dismissing the case for granting certiorari improvidently once a review of the record was made. Attached hereto as Appendix D is a complete list of the assignments of error and propositions of law raised by the Petitioner in the state courts.

Where federal questions are raised before this Court for the first time on review of state decisions, it is submitted that this Court should not decide those issues in this case.

II.

Whether Sections 2929.03 and 2929.04 of the Ohio Revised Code, which provide for the imposition of the death penalty under certain circumstances, are violative of the Eighth Amendment of the United States Constitution.

Respondent submits that the Ohio laws conform with constitutional standards as defined by this court and as applied by the Supreme Court of Ohio.

Following the decision in *Furman* v. *Georgia*, 408 U.S. 238 (1972), the Ohio legislature enacted Section 2929.02, Ohio Revised Code (Appendix A), which prescribes the death penalty or life imprisonment for the crime of aggravated murder. Sections 2929.03 and 2929.04, Ohio Revised Code, (Appendix A) set forth the procedure for determining whether the death sentence is to be imposed. Aggravated murder is limited to purposeful killing as defined by Section 2903.01, Ohio Revised Code (Appendix A).

Those statutes permit the death penalty only where one or more aggravating circumstances is specified in the indictment and proved beyond a reasonable doubt. The aggravating factors include: assassination of the President, Vice-President, Governor, Lieutenant Governor, or a person who has been elected to or is a candidate for any such office; murder for hire; murder to escape accountability for another crime; murder by a prisoner; repeat murder or

mass murder; killing a law enforcement officer; and murder in the course of certain felonies.

Under the Ohio statutory scheme the trier of fact may be either a jury or, if waived, a three-judge panel. First the trier of fact is to consider whether the defendant is guilty of the charge, and if found guilty, whether he is also guilty of one or more of the specifications in the indictment.

If the defendant is found guilty of the charge and innocent of the specification, a sentence of life imprisonment is imposed. If the defendant is found guilty of the charge and guilty of one or more of the specifications, a separate hearing is held before the trial judge or three-judge panel to determine whether mitigating circumstances exist which preclude imposition of the death penalty.

A pre-sentence investigation and a psychiatric examination of the defendant are required to be made before the hearing. Copies of these reports are furnished to the prosecutor and to the defendant or his counsel. Other evidence and testimony may be submitted at the mitigation hearing, including any statement, sworn or unsworn by the defendant. The death penalty is to be imposed if the trial judge or the three-judge panel unanimously finds that none of the three mitigating factors have been established to exist by a preponderance of the evidence.

In considering whether one of the mitigating circumstances has been established by a preponderance of the evidence the sentencing authority is to consider the nature and circumstances of the offense and the history, character, and condition of the defendant.

Thus, Ohio's statutes provide for a bifurcated trial, in which the issues of guilt, as to the charge and of certain statutorily defined aggravating circumstances, are determined by the jury or, if waived, by a three-judge panel,

and the issues of mitigation and sentence are determined by the trial judge or by the three-judge panel.

The defendant has a direct right of appeal of his conviction and sentence pursuant to Rule 4 (B), Ohio Rules of Appellate Procedure (Appendix B). Appeals by leave are governed by Rule 5, Ohio Rules of Appellate Procedure (Appendix B). In accordance with Rule 12 (A), Ohio Rules of Appellate Procedure (Appendix B), the Court of Appeals shall rule on all assignments of error briefed by the Appellant. If the sentence of death is affirmed by a Court of Appeals, a further appeal as a matter of right may be taken to the Supreme Court of Ohio, as provided by Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution (Appendix B).

Ohio's statutory scheme differs somewhat from any of those considered by this Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which this Court found to be constitutional. The Ohio statutory scheme insures that the sentencing authority is apprised of information relevant to the imposition of the death sentence and provided with standards to guide its use of the information. Guided by this information and applicable standards the sentencing authority is directed to give attention to the nature or circumstances of the crime committed and to the character of record of the defendant. Thus, Ohio's statutory scheme provides a framework in which the sentencing authority cannot wantonly or freakishly impose the death sentence.

A.

It is submitted that the mitigating circumstances enumerated in Section 2929.04 (B), Ohio Revised Code pass constitutional muster. These standards, although limited

to three, echo the language found in the Model Penal Code, (Section 210.6 (4) (c) (f) (g), and Florida Statutes (Section 921.141 (6) (b) (c) (e) (f). "While these questions and decisions may be hard, they require no more line-drawing than is commonly required of a fact finder in a lawsuit", *Proffitt* v. *Florida*, — U.S. —, 96 S. Ct. 2960, 2969 (1976). As the Court pointed out the requirements of *Furman* are satisfied, "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty", — U.S. —, 96 S. Ct. at 2969. Clearly, Ohio's statutory scheme satisfies this requirement.

The mitigating circumstances must also be considered as they have been construed by the Supreme Court of Ohio. The Supreme Court of Ohio has repeatedly held that the mitigating circumstances are not to be construed narrowly and that relevant factors, such as prior criminal record and the age of the defendant, are to be considered by the sentencing authority, *State* v. *Bell*, 48 Ohio St. 2d 270, 280-283 (1976); *State* v. *Black*, 48 Ohio St. 2d 262, 267-268 (1976); *State* v. *Woods*, 48 Ohio St. 2d 127, 133-138 (1976); and *State* v. *Osborne*, 49 Ohio St. 2d 135, 145-147 (1976). Through the state appellate procedure each of the mitigating circumstances in Section 2929.04 (B) has undergone close judicial scrutiny.

The mitigating circumstances in Section 2929.04 (B) channel and guide the discretion of the sentencing authority so as to avoid the arbitrary and capricious imposition of the death penalty.

B.

It is submitted that defendants facing the death penalty in Ohio have adequate appellate review so as to insure that

the penalty is not arbitrarily or capiciously imposed. Defendants have a direct right of appeal to the Court of Appeals and a direct right of appeal to the Supreme Court of Ohio where the lower court of review affirms their death sentence, Rule 4 (B), Ohio Rules of Appellate Procedure, Section 2 (B) (2) (a) (ii), Article IV of the Ohio Constitution. Thus, the Supreme Court of Ohio, a court with statewide jurisdiction, affords a defendant sentenced to death a full judicial review so as to promote the evenhanded, rational and consistent imposition of the death sentences under law. *Jurek* v. *Texas*, — U.S. —, 96 S. Ct. 2950, 2958 (1976); *State* v. *Miller*, 49 Ohio St. 2d 198, 204 (1977).

This Court has never mandated a particular form of appellate review in death penalty cases. In *State* v. *Bayless*, 48 Ohio St. 2d 73, 86 (1976), the Supreme Court of Ohio stated that in all capital cases the aggravating and mitigating circumstances would be independently reviewed in each case to insure that capital sentences are fairly imposed by Ohio's trial judges. As the Supreme Court of Ohio observed in *State* v. *Osborne*, 49 Ohio St. 2d 135, 146 (1976), "The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exists." Accordingly, all similarly situated defendants are sentenced alike and have their sentences reviewed by a court of statewide jurisdiction.

Contrary to Petitioner's assertion, the Supreme Court of Ohio is not precluded from inquiring into whether findings of fact are correct. In *State* v. *Edwards*, 49 Ohio St. 2d 31, 47 (1976) the Supreme Court of Ohio stated that a determination of whether there is substantial evidence to support the verdict rendered whether it be the verdict on

the criminal charge, aggravating circumstance, or mitigating circumstance, would be made in each capital case. This scope of review is consistent with both the review afforded by the courts in Georgia and Florida which this Court has determined to pass constitutional standards.

The fact that the Supreme Court of Ohio has affirmed all but one capital sentence it has reviewed only indicates that the Ohio statutory scheme has narrowed the scope of the statutes which provide for the death penalty, with further provisions to focus on the individual nature of the crime and characteristics of the defendant, so that all those upon whom the death penalty is imposed are truly similarly situated.

Prior to the decision in *Furman* v. *Georgia,* supra., the Ohio statutory scheme permitted the jury to extend mercy in a capital case. That standardless procedure of Ohio's was upheld by this Court in the case of *McGautha* v. *California,* 402 U.S. 183 (1971). In an order to comply with the dictates of *Furman* v. *Georgia,* supra., the present Ohio scheme, which provides standards to channel discretion, was enacted. Yet Petitioner now claims Ohio affords no discretion now, whereas before the problem was too much discretion. It is submitted Ohio's present statutory scheme does provide the sentencing authority with sufficient standards to channel their discretion so as to avoid arbitrary and capricious imposition of the death penalty.

C.

At the time the mitigation hearing is conducted a defendant stands convicted of aggravated murder and at least one of the aggravating circumstances which was specified in the indictment. The introduction of mitigating circumstances has traditionally been a defense function. The mitigating circumstances listed in Section 2929.04 (B) are

far broader than affirmative defenses which the defense must bear the burden of going forward with evidence in order to excuse or otherwise justify the commission of an offense.

Once the defendant stands convicted of the charge and specification, it should rightfully be his burden to present evidence as to why the punishment should be lessened. To require the defendant to do so does not infringe upon any due process rights, *State* v. *Lockett,* 49 Ohio St. 2d 48, 65-66 (1976).

Placing the burden of proof on the defendant at mitigation is clearly distinguishable from placing a burden of proof on the defendant to prove his innocence. For that reason it is submitted that the Ohio Statutory procedure does not run afoul of the Due Process Clause as this Court has interpreted that clause in the cases of *Mullaney* v. *Wilbur,* 421 U.S. 684 (1975) and *In re Winship,* 397 U.S. 358 (1970). In both those cases the Court stated it was the government's burden to prove *guilt* beyond a reasonable doubt. Ohio statutory scheme does not deviate from that command and is consistent with the Court's ruling in *Leland* v. *Oregon,* 343 U.S. 790 (1952).

D.

Although this Court has pointed out that the jury sentencing in a capital case can perform an important societal function, *Witherspoon* v. *Illinois,* 351 U.S. 510, 519 n. 15 (1968), it has never suggested that jury sentencing is constitutionally required, *Proffitt* v. *Florida,* — U.S. —, 96 S. Ct. 2960, 2966 (1976).

Pursuant to the Ohio statutory scheme the trial judge or three-judge panel is the sentencing authority depending on whether the defendant waives a trial by jury. It is submitted that this system of judicial sentencing enhances the con-

stitutionality of the Ohio statutory scheme in so far as it should lead to even greater consistency in the imposition of capital punishment due to the experience a trial judge has in sentencing procedures.

Prior to *Furman* v. *Georgia*, supra, the Supreme Court of Ohio held that there was no constitutional provision prohibiting a three-judge court from determining the degree of guilt and sentence without the intervention of a jury, where a jury trial had been voluntarily waived. *State* v. *Ferguson*, 175 Ohio St. 390, 396 (1964), *State* v. *Frohner*, 150 Ohio St. 53 (1948). As was mentioned earlier this Court held that Ohio's statutory scheme was constitutional in *McGautha* v. *California*, supra. It is submitted that the imposition of sentence by a three-judge panel or trial Court under the present statutory scheme is no different constitutionally than allowing a three-judge panel to impose sentence without the intervention of a jury under the previous statutory scheme.

III.

Whether a venireman, in a capital case, who is questioned during voir dire examination with respect to his attitude concerning capital punishment may be excused for cause where he unambiguously states he would be unable to join a verdict of guilty, in a proper case, where the death penalty could be imposed.

Forty veniremen were examined by counsel during voir dire until a jury of twelve plus two alternates was impaneled. Of these forty veniremen twelve were peremptorially challenged. All peremptory challenges were exhausted. Rule 24 (C), Ohio Rules of Criminal Procedure

(Appendix E). Eight other veniremen were excused for a variety of reasons including bad health, inability to be impartial and refusal to follow the instructions of the trial court.

The remaining six prospective jurors were excused for cause when they stated unambiguously that they could not join a verdict of guilty in a proper case where it is possible that the defendant could be sentenced to death. It is important to note that three of the jurors who were excused for other reasons (two peremptory challenges and inability to follow instructions) stated that they opposed the death penalty but could join in a verdict of guilty in a proper case where the defendant could be sentenced to death.

The record reflects that the trial court granted the State's challenge for cause only where the jurors stated that under no circumstances, or words to that effect, could they join in a verdict of guilty where the death penalty could be imposed.

Clearly the questioning of prospective jurors as to their attitudes concerning the death penalty was not foreclosed by the decision in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968). This Court's recent decision in *Davis* v. *Georgia*, — U.S. —, 97 S. Ct. 399 (1976) affirms that contention. In *Davis* v. *Georgia*, supra, the Court indicates a venireman may be properly excused if he is irrevocably committed, prior to trial, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings, 97 S. Ct. at 400. Respondent submits that a venireman may be properly excused if he is irrevocably committed, prior to trial, to vote against guilt where a verdict of guilty could result in the death penalty.

None of the jurors in the Petitioner's case were excused simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples

against its infliction. The Supreme Court of Ohio reviewed the record and concluded that sufficient reason existed for the trial court to believe that those jurors declared disqualified could not determine upon the evidence the guilt or innocence of the accused, but would automatically vote against a verdict which might lead to capital punishment.

Section 2945.25 (C) of the Ohio Revised Code (Appendix A) provides that a person called to serve as a juror may be challenged in the trial of a capital offense for the cause that his opinions preclude him from finding the accused guilty of an offense punishable with death. Rule 24, Ohio Rules of Criminal Procedure (Appendix E), effective July 1, 1973, contains no explicit parallel to Section 2945.25 (C). However, Rule 24 (B) (9) provides that a person called as a juror may be challenged for cause if he possesses a state of mind evincing insurmountable bias toward the defendant or the state. Additionally, Rule 24 (B) (14) provides that a person called as a juror may be challenged for cause if he is unsuitable for service as a juror for reasons other than those expressly set forth in the rule. The challenges for cause in this case were granted in accordance with the statute, rules and constitutional standards decided by this Court.

The Supreme Court of Ohio gave close judicial scrutiny to Petitioner's claim that prospective jurors were improperly discharged for cause. Likewise, the Supreme Court of Ohio has addressed the identical issue in four other cases: *State* v. *Bayless*, 48 Ohio St. 2d 73, 87-94 (1976); *State* v. *Reaves*, 48 Ohio St. 2d 127, 130 (1976); *State* v. *Lockett*, 49 Ohio St. 2d 48, 55-57 (1976); and *State* v. *Lane*, 49 Ohio St. 2d 77, 79-80 (1976). Thus, the Supreme Court of Ohio has taken extreme precaution to scrupulously review the record whenever a claim is made in a capital

case that a prospective juror was dismissed for stating simply that he opposed capital punishment.

IV.

Whether Petitioner's due process rights were violated where the trial court erred in favor of the Petitioner concerning the admissibility on an admission, and where the court instructs the jury that any statements of the court or counsel are not evidence and they are not to contemplate reasons for rulings on objections.

During the course of the State's case the trial court refused to permit the prosecutor from introducing admissions made by the Petitioner, moments after he left the Reed residence, to Patricia Sue Ramey into evidence.

The question asked of Patricia Sue Ramey, who was waiting in a car outside the Reed residence, was whether the Petitioner had said anything about what had happened in the Reed house. The witness was permitted to answer that the Petitioner had made a statement but was precluded from saying what the statement was.

A short dialogue between the trial court and the prosecutor transpired as a result of the court's sustaining an objection to having Patricia Sue Ramey testify as to what the Petitioner had told her about what had happened at the Reed residence. During the dialogue the prosecutor offered the opinion that admissions by a defendant are admissible. The trial court instructed the prosecutor to not pursue the matter any further. The prosecutor abided by the trial court's ruling.

Clearly the trial court erred in favor of the Petitioner by excluding the admission which should have been admis-

sible as an exception to the rule against hearsay. Admissions by defendants are admissible against them in criminal proceedings. The authority permitting the admissibility of such an admission is overwhelming, see, *McCormick on Evidence* (2d Ed.), 629-30 (1972); *Wharton's Criminal Evidence*, 13th Edition, Sections 694, 696, 698; 4 *Wigmore Evidence*, Section 1050 (Chadbourne Rev. 1972); 22A *Corpus Juris Secundum*, Criminal Law, Section 730; 29 *American Jur. 2d*, Evidence, Section 611; and 15 A *Ohio Jur. 2d*, Criminal Practice and Procedure, Sections 268, 276, 277.

Petitioner's assertion that he was forced to take the witness stand to explain the admission, which was not disclosed to the jury, is raised for the first time before this Court. It is respectfully submitted that other factors, including the testimony of Mrs. Reed who survived the Petitioner's assault and the testimony of the FBI agent to whom Petitioner confessed, may have been the reason the Petitioner actually decided to testify as to his version of the events that occurred on August 5, 1974.

Furthermore, the trial court in its general charge correctly instructed the jury that no comment made by counsel or by the court is evidence. Accordingly, Petitioner's due process rights were not infringed upon by virtue of the fact that the trial court erroneously made an evidentiary ruling in Petitioner's favor that excluded an admission made by the Petitioner.

V.

Whether the Petitioner's due process rights were violated where no objection was made to the trial court's instruction to the jury with respect to evidence of other acts.

The issue of other criminal acts perpetrated by the Petitioner was injected into the trial during cross-examination of Patricia Sue Ramey by Petitioner's trial counsel. Section 2945.59 of the Ohio Revised Code (Appendix A) provides that in any criminal case in which the defendant's intent or system is material, acts of the defendant tending to show his intent or system may be proved, whether they are prior or subsequent thereto, notwithstanding that such proof may tend to show the commission of another crime by the defendant. Petitioner's counsel at trial argued to the jury during closing argument that the other crimes contained the same *modus operandi* as the crime for which the Petitioner was on trial. Thus, the evidence adduced as to other crimes was admissible within the scope of Section 2945.59 of the Ohio Revised Code.

As part of the general charge the trial court instructed the jury:

> ". . . If you find from the evidence that the defendant did commit the act or acts with which he is now charged, you may consider evidence of any similar act to determine the existence of purpose or knowledge, plan, scheme or device. Evidence of other acts may be considered as proof that the defendant did act as alleged in the indictment." (R 713)

Following the general charge no objection was made by Petitioner's counsel as to the charge on other acts.

Rule 30, Ohio Rules of Criminal Procedure (Appendix E) requires that a party make a specific objection to any portion of the court's charge he may want to assign as error prior to the jury retiring to deliberate. Thus, Petitioner is precluded from assigning as error the court's instruction on other acts. The Ohio Supreme Court held that Petitioner failed to preserve this alleged error. It is submitted that, taken as a whole, the court's charge correctly stated the law and there is no reason to believe that the jury was misled.

Accordingly, Petitioner's due process rights were not violated nor was he denied equal protection of the law by the instruction of the trial court which correctly instructed the jury as to the admissibility of evidence of other acts.

VI.

Whether the Petitioner's due process rights were violated where Petitioner made no objection to the trial court's jury instruction on the charge of aggravated murder.

Once again the Petitioner failed to object to the trial court's charge on aggravated murder. In its decision the Ohio Supreme Court held that Petitioner failed to preserve this error. Rule 30, Ohio Rules of Criminal Procedure precludes him from raising as error those matters he fails to object to prior to the jury retiring to deliberate. It is true that the prosecutor did object to the charge but that does not alleviate Petitioner from his obligation to object if he wishes to assign as error any portion of the trial court's charge.

The court's charge, taken as a whole, properly defined the elements of aggravated murder before the jury retired to deliberate. It is a well settled principle that "jury

instructions are to be judged as a whole, rather than picking isolated phrases from them", *Boyd* v. *United States*, 271 U.S. 104, 107 (1926).

There is no evidence in the record that the jury was misled or confused. There were no requests for re-instruction as to any of the jury instructions. Accordingly, it is submitted that Petitioner's due process rights were not violated nor was he denied equal protection of the law.

CONCLUSION

In summary, it is respectfully submitted that the Court should deny a writ of certiorari in this case for three reasons. First, the Supreme Court of Ohio correctly decided the issue with respect to dismissal of jurors for cause in a capital case in accordance with the decisions of this Court. Secondly, Petitioners due process rights were not violated nor was he denied equal protection of the law by the rulings of the trial court as to the admissibility of certain evidence and the trial court's instructions to the jury. Thirdly, Petitioner has failed to raise or preserve questions involving the constitutionality of the death penalty in the state courts. Accordingly, Respondent respectfully asks this Court to deny the writ of certiorari in this case.

Respectfully submitted,

SIMON L. LEIS, JR.
Prosecuting Attorney

FRED J. CARTOLANO
First Assistant Prosecuting Attorney

LEONARD KIRSCHNER
Assistant Prosecuting Attorney

ROBERT R. HASTINGS, JR.
Assistant Prosecuting Attorney

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

§ 2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.

(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.

(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his dependents, or will prevent him from making reparation for the victim's wrongful death.

§ 2929.03 Imposing sentence for a capital offense

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which

may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three

judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

§ 2929.04 Criteria for imposing death or imprisonment for a capital offense

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

§ 2945.25 Causes of challenging of jurors

A person called as a juror on an indictment may be challenged for the following causes:

(A) That he was a member of the grand jury which found such indictment;

(B) That he has formed or expressed an opinion as to the guilt or innocence of the accused; but if a juror has formed or expressed such an opinion, the court shall examine such juror on oath, as to the grounds thereof, and if such juror says that he can render an impartial verdict notwithstanding such opinion, and the court is satisfied that such juror will render an impartial verdict on the evidence, the court may admit him as competent to serve as a juror in such cause;

(C) In the trial of a capital offense, that his opinions preclude him from finding the accused guilty of an offense punishable with death;

(D) That he is related within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant;

(E) That he served on a petit jury drawn in the same cause against the same defendant, and such jury was discharged after hearing the evidence or rendered a verdict thereon which was set aside;

(F) That he served as a juror in a civil case brought against the defendant for the same act;

(G) That he has been subpoenaed in good faith as a witness in the case;

(H) That he is an habitual drunkard.

Challenges shall be allowed as in sections 2313.41 to 2313.43, inclusive, of the Revised Code.

§ 2945.59 Proof of defendant's motive

In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior to subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

APPENDIX B

APPELLATE RULES

RULE 4. Appeal as of right — when taken

* * *

(B) Appeals in criminal cases. In a criminal case the notice of appeal by a defendant shall be filed with the clerk of the trial court within thirty days of the date of the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within thirty days after the entry of an order denying the motion. A motion for a new trial on the ground of newly discovered evidence, made after expiration of the time for filing a motion for new trial on other grounds, will not extend the time for appeal from a judgment of conviction. In an appeal by the prosecution, the notice of appeal shall be filed in the trial court within thirty days of the date of the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this subdivision when it is filed with the clerk of the trial court for journalization.

RULE 5. Appeals by leave of court in criminal cases

(A) Motion and notice of appeal. After the expiration of the thirty day period provided by Rule 4 (B) for the

filing of a notice of appeal as of right in criminal cases, an appeal may be taken only by leave of the court to which the appeal is taken. In such event, a motion for leave shall be filed with the court of appeals setting forth the reasons for the failure of the appellant to perfect an appeal as of right and setting forth the errors which the movant claims to have occurred in the proceedings of the trial court. The motion shall be accompanied by affidavits, or by such parts of the record upon which the movant relies, to show the probability that the errors claimed did in fact occur, and by a brief or memorandum of law in support of the movant's claims. Concurrently with the filing of the motion the movant shall file with the clerk of the trial court a notice of appeal in the form prescribed by Rule 3 and file a copy of the notice of appeal in the court of appeals. The movant shall also furnish a copy of his motion and a copy of the notice of appeal to the clerk of the court of appeals who thereupon shall serve the notice of appeal and a copy of the motion for leave to appeal upon the attorney for the prosecution, who may, within thirty days from the filing of the motion, file such affidavits, parts of the record and brief or memorandum of law to refute the claims of the movant.

(B) Determination of the motion. Except when required by the court the motion shall be determined by the court of appeals on the documents filed without formal hearing or oral argument.

(C) Order and procedure following determination. Upon determination of the motion, the court shall journalize its order and the order shall be filed with the clerk of the court of appeals, who thereupon shall certify a copy of the order and mail or otherwise forward the copy to the clerk of the trial court. In the event that the motion

for leave to appeal is overruled the clerk of the trial court shall collect the costs pertaining to the motion, in both the court of appeals and the trial court, from the movant. In the event that the motion is sustained and leave to appeal is granted the further procedure shall be the same as for appeals as of right in criminal cases, except as otherwise specifically provided in these rules.

RULE 12. Determination and judgment on appeal

(A) Determination. In every appeal from a trial court of record to a court of appeals, not dismissed, the court of appeals shall review and affirm, modify, or reverse the judgment or final order of the trial court from which the appeal is taken. The appeal shall be determined on its merits on the assignments of error set forth in the briefs required by Rule 16, on the record on appeal as provided by Rule 9, and, unless waived, on the oral arguments of the parties, or their counsel, as provided by Rule 21. Errors not specifically pointed out in the record and separately argued by brief may be disregarded. All errors assigned and briefed shall be passed upon by the court in writing, stating the reasons for the court's decision.

CONSTITUTION OF THE STATE OF OHIO
Art. IV, § 2

§ 2. Supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B) (1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended by 132 v HR 42, eff. 5-7-68; 120 v 743)

APPENDIX C

OPINIONS BELOW

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NO. C-75379

STATE OF OHIO,
Plaintiff-Appellee,

vs.

WILLIAM ROLAND ROBERTS,
Defendant-Appellant.

DECISION

(Filed April 19, 1976)

Messrs. Simon L. Leis, Jr., Fred J. Cartolano and Robert R. Hastings, Jr., 420 Hamilton County Courthouse, Court & Main Streets, Cincinnati, Ohio 45202, for Plaintiff-Appellee.

Mr. Harvey B. Woods, 1212 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers

from the Court of Common Pleas of Hamilton County, the transcript of the proceedings, assignments of error, briefs and oral arguments of counsel.

Defendant-appellant, William Roland Roberts, was charged in a single indictment with aggravated murder, three counts of kidnapping, aggravated robbery, and felonious assault. The indictment also contained a specification listed in division (A) of R.C. § 2929.04. Appellant entered pleas of not guilty and not guilty by reason of insanity. A jury found him guilty on all six counts and, in addition, guilty of the specification. Subsequently, the court sentenced appellant to consecutive terms of imprisonment on the kidnapping, aggravated robbery, and felonious assault convictions. With respect to the aggravated murder, after a hearing mandated by R.C. § 2929.03 (D), appellant was sentenced to death as provided by law.

Appellant urges nine assignments of error, the first of which follows:

> The court erred in excusing prospective jurors for cause by the prosecution when they expressed an opinion on opposition to capital punishment, even though they did indicate they could determine the guilt or innocence of the defendant.

In his brief, appellant lists the names of six prospective jurors who were excused for cause even though they indicated, upon voir dire examination, that they could determine the guilt or innocence of the defendant despite their personal opposition to capital punishment. This assertion by appellant notwithstanding, all six prospective jurors, at some point in the questioning by the court or counsel, either stated unequivocally that they could not, in a proper case, find appellant guilty knowing that death would be a possible punishment for one of the crimes or

stated that they would have tremendous difficulty in doing so.

In view of the above developments, all chronicled in the record, we believe the challenges for cause, complained of here, to be justified. This conclusion receives support from a footnote to *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968):

> "We repeat, however, that nothing we say today bears upon the power of a State to execute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." (p. 522, 523)

The first assigned error lacks merit and is overruled.
The second assignment of error reads:

> The Court erred in overruling the motion of the defendant to withdraw a juror and declare a mistrial for prejudicial statements of the prosecutor while talking to the court in the presence of the jury.

The record reflects that the prosecutor attempted to elicit from a state's witness testimony which would attribute a certain statement to appellant. Counsel for appellant objected and the objection was sustained. The witness did not repeat, under oath, any statement made to her by appellant.

Without passing upon the legal soundness of the trial court's ruling, we are unable to perceive, in light of the sustaining of the objection, any prejudice which would

rise to that degree of error as to require a declaration of a mistrial.

The second alleged error is overruled.

The third assignment of error urges:

> The court erred in refusing to permit defendant counsel to confer together during cross examination of a witness for the prosecution.

After a number of conferences between defense co-counsel, the court admonished the appellant's lawyers for the particular manner adopted by them for in-trial conferences. The record articulates no absolute prohibition against conferences during trial. The obligation of conducting an orderly trial rests with the court which possesses reasonable discretion with respect thereto. We perceive no abuse of discretion in the court's handling of the conference routine, and assignment of error three is overruled.

The fourth, fifth and seventh assignments deal generally with the same subject matter and will be disposed of concurrently.

They assert:

> Fourth: The court erred in permitting re-direct examination of a prosecution witness as to other alleged crimes involving the defendant, over the objection of the defense.
>
> Fifth: The court erred in not instructing the jury as to the law of same and similar crimes at the time of the testimony of such crimes over the objection of the defendant and did not fuly explain to the jury the purpose for which such testimony was admitted in its general charge to the jury.
>
> Seventh: The court erred in its instruction to the jury that the jury may consider evidence of other acts as proof that the defendant did act as alleged in the indictment.

The record reveals that appellant's counsel cross-examined a state's witness about her participation, with appellant, in various hold-ups which appellant engaged in. On re-direct examination the presocutor pursued that line of questioning.

Those acts, which were the subject of the re-direct examination, are of the type contemplated by R. C. 2945.-59, the so-called similar acts statute, which is reproduced below:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

The witness testified that appellant had robbed a priest and his housekeeper and had locked them in the trunk of an automobile. (T.p. 545) The evidence of these acts, which the witness said occurred approximately two weeks after the offenses charged in the present indictment must be said to be competent and admissible for the purposes indicated in R. C. 2945.59.

Although appellant's counsel objected to a number of the prosecutor's questions on the re-direct examination of the witness, there was never a request by counsel for the court to instruct the jury on the limited purpose of the evidence of similar acts. Nor was there any objection to the court's failure to do so. Any error which results because of a trial court's failure to give such an instruction

is cured by so instructing the jury in the general charge at the conclusion of the case. This proposition of law is enunciated in *State* v. *Pope*, 171 Ohio St. 438 (1961) the first paragraph of the syllabus of which reads:

> Failure of the trial court in a criminal case to instruct the jury as to the purpose of testimony as to similar offenses charged to the accused and the manner in which it is to be considered, at the time such testimony is admitted, is not reversible error, where no request for such instruction is made and the court covers the matter adequately and correctly in the general charge.

A reading of the record reveals that although portions of the instructions reflect an improvidence in content, nevertheless, the entire charge, taken as a whole, fairly and adequately conforms to the law.

It follows that assignments four, five, and seven lack merit and must be overruled.

The verbatim sixth challenge states:

> The court erred in its instruction to the jury upon the charge of murder as was alleged in the indictment.[1]

After the court completed the general charge to the jury, inquiry was made of counsel as to whether any changes or additions were desired. The state pointed out to the court that there was an incorrect statement upon the charge of aggravated murder. Counsel for appellant did not disagree at that point and the court proceeded to correct that portion of the instruction about which a measure of ambiguity existed.

[1] It is apparent to us, from the argument in support of this assignment, that appellant intends to challenge the court's instruction on the charge of aggravated murder, not simply murder.

Now, for the first time, upon appeal, appellant's dissatisfaction with the charge as it related to aggravated murder is raised. Such procedure is inconsistent with Crim. R. 30, the pertinent portion of which follows:

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

This rule forecloses appellant from prevailing on the sixth assignment of error. Nevertheless, we note that the court's correction of his instructions did result in a proper charge containing a valid explanation of the various elements of all the crimes charged.

The sixth assignment of error is overruled.

The next alleged error, the eighth, reads:

> The court erred in refusing to charge the jury on the included offense of aggravated (sic) murder (Sec. 2903.02 ORC) upon the request of the defendant.[2]

The elements of aggravated murder, so far as our review here is concerned, are to "purposely cause the death of another while committing . . . aggravated robbery or robbery." [R.C. 2903.01 (B)]. Murder is to "purposely cause the death of another." [R.C. 2903.02 (A)]. Appellant does not deny robbing the deceased victim. If the trier of fact concluded, as the jury obviously did, that Roberts purposely caused the death of another, he is guilty of aggravated murder, the robbery being undisputed.

[2] From the state of the record and appellant's brief, it is clear that the inclusion of the word "aggravated" in this assignment is a mistake. Appellant requested an instruction on the included offense of *murder*.

Appellant was not entitled to an instruction on the crime of simple murder.

It follows that the eighth assignment of error is meritless and overruled.

The final asserted error claims that the verdict of the jury is manifestly against the weight of the evidence. In particular, appellant emphasizes that there was insufficient proof that appellant *purposely* caused the death of the victim vis-a-vis the aggravated murder charge. Furthermore, the final assignment also challenges the jury's obvious conclusion that Patricia Sue Ramey, one of the kidnapped women, was actually restrained of her liberty by defendant Roberts, i.e., against her will. A reading of the record, with special attention to these two contentions, indicates that the state adduced more than a sufficient amount of competent evidence which, if believed by the jury (as manifestly it was), would justify the verdicts which the jury returned.

The ninth assignment of error is overruled.

We affirm the judgment.

SHANNON, P. J., PALMER and KEEFE, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

SUPREME COURT OF OHIO

THE STATE OF OHIO,

Appellee,

v.

ROBERTS,

Appellant.

[Cite as State v. Roberts (1976), 48 Ohio St. 2d 221.]

Criminal law—Aggravated murder—Death penalty imposed—Trial—Alleged errors in voir dire, admission and sufficiency of evidence, instructions to jury—Not prejudicial, when—Crim. R. 30, construed.

(No. 76-558—Decided December 15, 1976.)

APPEAL from the Court of Appeals for Hamilton County.

Appellant, William R. Roberts, was convicted of aggravated murder with a specification, and of aggravated robbery, felonious assault, and three counts of kidnapping. The indictment specified that the murder was committed while appellant was in the commission of an aggravated robbery, one of the aggravating circumstances listed in R. C. 2929.04 (A). The jury found that the specification had been proven beyond a reasonable doubt. Thereafter, none of the mitigating factors enumerated in R.C. 2929.04 (B) was established, and the trial court, as required by R. C. 2929.03, sentenced appellant to death on the aggravated murder conviction, and to imprisonment from seven to twenty-five years on the second count, from five to twenty-five years on the third count, and from seven to twenty-

five years on each of the fourth, fifth and sixth counts of the indictment, all to run consecutively, should the death sentence be modified by another court.

The Court of Appeals affirmed the judgment of the trial court, and the cause is now before this court upon an appeal as of right.

Mr. Simon L. Leis, Jr., prosecuting attorney, *Mr. Fred J. Cartolano, Mr. Robert R. Hastings, Jr.*, and *Mr. David Davis*, for appellee.

Mr. Harvey B. Woods, for appellant.

Per Curiam. The state presented evidence that appellant, who already had kidnapped and was holding one Patricia Sue Ramey, abducted Mr. and Mrs. William H. Reed on August 5, 1974, and took them to their home in Cincinnati. Appellant bound the Reeds, took their money, struck Mrs. Reed, and eventually choked Mr. Reed to death. Witnesses at trial included Ramey, Mrs. Reed and appellant.

Appellant submits that the removal of prospective jurors for cause, upon motion of the prosecution, when such jurors express an opinion opposing capital punishment, but indicate they could determine the guilt or innocence of defendant based on the evidence, is reversible error under *Witherspoon* v. *Illinois* (1968), 391 U.S. 510.

This court has held that upon examination of a prospective juror to determine whether he should be disqualified from a capital case due to his opposition to the death penalty, the most that can be demanded of him is that he consider all the penalties provided by state law, and that he not be irrevocably committed before trial to voting against the death sentence regardless of the facts. *State* v. *Watson* (1971), 28 Ohio St. 2d 15, 275 N. E. 2d 153. This court has expressly pointed out that the essential holding

of *Witherspoon* is its prohibition of the death sentence if the jury imposing or recommending it excluded veniremen for cause merely because they voiced general objections to capital punishment or expressed conscientious or religious scruples against it. *State* v. *Wilson* (1972), 29 Ohio St. 2d 203, 208, 280 N. E. 2d 915. Decisions handed down by this court, in light of *Witherspoon*, have entailed the careful interpretation of the language utilized by respective courts, litigants, and veniremen in asking and answering whether veniremen would "*automatically* vote against the imposition of the death penalty." *State* v. *Anderson* (1972), 30 Ohio St. 2d 66, 69, 282 N. E. 2d 568. See, also, *State* v. *Bayless* (1976), 48 Ohio St. 2d 73, — N. E. 2d —.

The statutes of this state have provided that a person called to serve as a juror may be challenged in the trial of a capital offense for the cause that his opinions preclude him from finding the accused guilty of an offense punishable with death. R. C. 2945.25 (C). Crim. R. 24, effective July 1, 1973, encompasses no explicit parallel to R. C. 2945.25 (C). However, Crim. R. 24 (B) (9) does provide that a person called as a juror may be challenged for cause if he possesses a state of mind evincing insurmountable bias toward the defendant or the state. Crim. R. 24 (B) (14) similarly provides that a person called as a juror may be challenged for cause if he is unsuitable for service as a juror for reasons other than those expressly laid out in the rule. The wording of Crim. R. 24 is sufficiently broad to render unsuitable, as one who may be challenged for cause,[1] a juror of the type accounted for by R. C. 2945.25 (C).

[1] "The language of Criminal Rule 24(B)(14) is sufficiently broad • • • to include the unsuitability of a juror in a capital case." Schroeder and Katz, 2 Ohio Criminal Law and Practice 229 (1974).

Our review of the record indicates that sufficient reason existed for the trial court to believe that those jurors declared disqualified could not determine upon the evidence the guilt or innocence of the accused, but would automatically vote against a verdict which might lead to capital punishment. The removal of thus biased prospective jurors for cause does not constitute reversible error.

Appellant complains that a mistrial should have been declared because of certain statements made by the prosecutor in the presence of the jury. The remarks dealt with an "admission" made by appellant, which we find to have been admissible as an exception to the rule against hearsay, and which was erroneously excluded by the trial court. See McCormick on Evidence (2d Ed.), 629-30 (1972). Under such circumstances, no error prejudicial to appellant occurred. Furthermore, the court in its general charge correctly instructed the jury that no comment made by counsel or by the court is evidence.

Appellant urges that the refusal of the trial court to permit counsel for appellant to confer in front of the bench during cross-examination of a prosecution witness constitutes prejudicial error. Our examination of the record on this point does not disclose an abuse of discretion by the trial court which would warrant or necessitate a reversal of this cause.

Appellant submits that it was prejudicial error for the trial court to permit, over the objection of the defense, the redirect examination of a prosecution witness relative to another alleged crime involving the appellant, after defense counsel had questioned the witness on cross-examination regarding where the appellant had received money, and the witness answered that some was obtained from other robberies. R. C. 2945.59 provides that in any criminal case in which the defendant's intent or system is material,

acts of the defendant tending to show his intent or system may be proved, whether they are prior or subsequent thereto, notwithstanding that such proof may tend to show the commission of another crime by the defendant. See *State* v. *Hector* (1969), 19 Ohio St. 2d 167, 249 N. E. 2d 912; *State* v. *Moorehead* (1970), 24 Ohio St. 2d 166, 265 N. E. 2d 551; *State* v. *Burson* (1974), 38 Ohio St. 2d 157, 311 N. E. 2d 526; *State* v. *Cox* (1975), 42 Ohio St. 2d 200, 327 N. E. 2d 639; and *State* v. *Curry* (1975), 43 Ohio St. 2d 66, 330 N. E. 2d 720. Inasmuch as the subject of the redirect examination was brought out by counsel for appellant during cross-examination,[2] and since counsel for appellant indicated that evidence produced by appellant did tend to prove a system, we cannot agree that prejudicial error obtained.

Appellant argues the trial court erred in failing to instruct the jury regarding the law of same and similar crimes at the time of the testimony of such crimes over defense objection, and in not fully explaining, in its general charge to the jury, the purpose for which such testimony was admitted. Failure of a trial court in a criminal prosecution to admonish the jury, when evidence of same or similar acts is introduced under R. C. 2945.59, that such evidence cannot be considered substantive evidence of the crime charged, and to limit the purpose for which such evidence is received, can, under appropriate circumstances, constitute error. However, counsel for appellant failed to register an objection regarding the instructions of the trial court to the jury and, therefore, he is precluded from assigning the omission as error. Crim. R. 30. The soundness of this rule has long been recognized by this court. See

[2] The practice is uniform that redirect examination may include new matter drawn out in the next previous examination. McCormick on Evidence (2 Ed.), 64 (1972).

State v. *Nelson* (1973), 36 Ohio St. 2d 79, 85, 303 N. E. 2d 865. Moreover, a judgment of conviction is not to be reversed because of the admission of any evidence offered against a defendant or because of a misdirection of the jury, unless the defendant was or may have been prejudiced thereby. Crim. R. 33 (E) (3) and (4). Even if we were to address as error the trial court's failure to instruct the jury as to the law of same and similar crimes at the time of the testimony of such crime, or the failure of the trial court fully to explain for jurors the purpose for which such testimony was admitted in its general charge, the instant record would compel a conclusion that such was harmless error beyond a reasonable doubt. *State* v. *Crawford* (1972), 32 Ohio St. 2d 254, 291 N. E. 2d 450.

Appellant contends that an instruction to the jury upon the aggravated murder charge, as alleged in the indictment, constituted prejudicial error by the trial court. Apparent confusion on the part of the trial court relative to the law of aggravated murder led to an exchange between the trial court, the prosecution, and counsel for appellant. The argument of appellant is that it was not necessary that counsel for appellant bring the alleged error to the attention of the trial court because this had been done by the prosecution.

Crim. R. 30, in relevant part, provides:

"A party may not assign as error the giving or the failure to give any instruction unless *he* objects thereto before the jury retires to consider its verdict, stating specifically the matter to which *he* objects and the grounds of *his* objection." (Emphasis added.)

The language of the rule does not allow for the interpretation which appellant would impose upon it.

Appellant states that the trial court's instruction that the jury might consider evidence of other acts as proof

that appellant performed as alleged in the indictment constituted prejudicial error by the trial court. Appellant did not call the attention of the trial court to the allegedly prejudicial error attacked here, but suggests that because this was an error of commission by the trial court it was not one to be called to the court's attention. To the contrary, however, Crim. R. 30 puts the burden of timely objection upon the party making the subsequent assignment of error; this applies to the positive giving of instructions to the jury as well as the omission of them. The trial court's charge regarding evidence as to similar acts was not as good as possible, but upon our examination of the record we have no reason to believe that the jury was misled.

Appellant complains that the trial court's refusal to charge the jury on the included offense of murder was reversible error. Appellant suggests that the jury might have found appellant guilty of murder (but not aggravated murder) even though a felony had been committed, the felony being completed by the time of the homicide.

If the trier of fact "could *reasonably* find against the state for the accused upon one or more of the elements of the crime charged and for the state and against the accused on the remaining elements, which by themselves would sustain a conviction upon a lesser included offense, then a charge on the lesser included offense is both warranted and required, not only for the benefit of the state but for the benefit of the accused." *State* v. *Nolton* (1969), 19 Ohio St. 2d 133, 135, 249 N. E. 2d 797; *State* v. *Carver* (1972), 30 Ohio St. 2d 280, 290, 285 N. E. 2d 26; and *State* v. *Fox* (1972), 31 Ohio St. 2d 58, 64, 285 N. E. 2d 358. But this contention of appellant fails, because the record at bar does not establish that the jury could rea-

sonably find the non-homicide felony complete by the time of the murder.

Appellant asserts that the evidence adduced was insufficient in law to support the jury's verdict. However, upon reviewing the record, it is our conclusion that sufficient probative evidence was adduced upon each of the essential elements of the crimes charged. Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE, W. BROWN and P. BROWN, JJ., concur.

APPENDIX D

QUESTIONS RAISED BELOW

STATE v. ROBERTS

No. 76-558

PROPOSITION OF LAW NO. 1

To excuse prospective jurors for cause, by the prosecution, when they express an opinion on opposition to capital punishment when they indicate they could determine the guilt or innocense of the defendant based on the evidence is reversible error.

PROPOSITION OF LAW NO. 2

Overruling a motion of the defendant to withdraw a juror and declare a mistrial for prejudicial statements of the prosecutor while talking to the court in the presence of the jury is prejudicial error.

PROPOSITION OF LAW NO. 3

Refusing to permit defense counsel to confer together during cross examination of a witness for the prosecution is prejudicial error.

PROPOSITION OF LAW NO. 4

Permitting re-direct examination of a prosecution witness as to other alleged crimes involving the defendant, over the objection of the defense constitutes prejudicial error.

PROPOSITION OF LAW NO. 5

Failure to instruct the jury as to the law of same and similar crimes at the time of the testimony of such crimes over the objection of the defendant, and not fully explaining to the jury the purpose for which such testimony was admitted in its general charge to the jury is prejudicial error.

PROPOSITION OF LAW NO. 6

Erroneous instruction to the jury upon the charge of aggravated murder as was alleged in the indictment is prejudicial error by the court.

PROPOSITION OF LAW NO. 7

Instruction to the jury that the jury may consider evidence of other acts as proof that the defendant did act as alleged in the indictment constitutes prejudicial error by the court.

PROPOSITION OF LAW NO. 8

Refusing to charge the jury on the included offense of murder (Sect. 2903.02 ORC) upon the request of the defendant, where proper, is reversible error.

PROPOSITION OF LAW NO. 9

The verdict of the jury is manifestly against the weight of the evidence, where the evidence does not tend to support the charge against the defendant.

STATE v. ROBERTS

No. C-75379

ASSIGNMENTS OF ERROR

FIRST ASSIGNMENT OF ERROR

The coure erred in excusing prospective jurors for cause by the prosecution when they expressed an opinion on opposition to capital punishment, even though they did indicate they could determine the guilt or innocence of the defendant.

SECOND ASSIGNMENT OF ERROR

The court erred in over-ruling the motion of the defendant to withdraw a juror and declare a mistrial for prejudicial statements of the prosecutor while talking to the court in the presence of the jury.

THIRD ASSIGNMENT OF ERROR

The court erred in refusing to permit defense counsel to confer together during cross examination of a witness for the prosecution.

FOURTH ASSIGNMENT OF ERROR

The court erred in permitting re-direct examination of a prosecution witness as to other alleged crimes involving the defendant, over the objection of the defense.

FIFTH ASSIGNMENT OF ERROR

The court erred in not instructing the jury as to the law of same and similar crimes at the time of the testimony

of such crimes over the objection of the defendant and did not fully explain to the jury the purpose for which such testimony was admitted in its general charge to the jury.

SIXTH ASSIGNMENT OF ERROR

The court erred in its instruction to the jury upon the charge of murder as was alleged in the indictment.

SEVENTH ASSIGNMENT OF ERROR

The court erred in its instruction to the jury that the jury may consider evidence of other acts as proof that the defendant did act as alleged in the indictment.

EIGHTH ASSIGNMENT OF ERROR

The court erred in refusing to charge the jury on the included offense of aggravated murder (Sect. 2903.02 ORC) upon the request of the defendant.

NINTH ASSIGNMENT OF ERROR

The verdict of the jury is manifestly against the weight of the evidence.

APPENDIX E

OHIO RULES OF CRIMINAL PROCEDURE

RULE 24 TRIAL JURORS

(A) Examination of jurors

Any person called as a juror for the trial of any cause shall be examined under oath or upon affirmation as to his qualifications. The court may permit the attorney for the defendant, or the defendant if appearing pro se, and the attorney for the state to conduct the examination of the prospective jurors or may itself conduct the examination. In the latter event, the court shall permit the state and defense to supplement the examination by further inquiry.

(B) Challenge for cause

A person called as a juror may be challenged for the following causes:

(1) That he has been convicted of a crime which by law renders him disqualified to serve on a jury.

(2) That he is a chronic alcoholic, or drug dependent person.

(3) That he was a member of the grand jury which found the indictment in the case.

(4) That he served on a petit jury drawn in the same cause against the same defendant, and such jury was discharged after hearing the evidence or rendering a verdict thereon which was set aside.

(5) That he served as a juror in a civil case brought against the defendant for the same act.

(6) That he has an action pending between him and the State of Ohio or the defendant.

(7) That he or his spouse is a party to another action then pending in any court in which an attorney in the cause then on trial is an attorney, either for or against him.

(8) That he has been subpoenaed in good faith as a witness in the case.

(9) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from the examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial.

(10) That he is related by consanguinity or affinity within the fifth degree to the person alleged to be injured or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted; or to the defendant.

(11) That he is the person alleged to be injured or attempted to be injured by the offense charged, or the person on whose complaint the prosecution was instituted, or the defendant.

(12) That he is the employer or employee, or the spouse, parent, son, or daughter of the employer or em-

ployee, or the counsellor, agent, or attorney, of any person included in subsection (B) (11).

(13) That English is not his native language, and his knowledge of English is insufficient to permit him to understand the facts and the law in the case.

(14) That he is otherwise unsuitable for any other cause to serve as a juror.

The validity of each challenge listed in this subdivision shall be determined by the court.

(C) Peremptory challenges

In addition to challenges provided in subdivision (B), if there is one defendant, each party peremptorily may challenge three jurors in misdemeanor cases, four jurors in felony cases other than capital cases, and six jurors in capital cases. If there is more than one defendant, each defendant peremptorily may challenge the same number of jurors as if he were the sole defendant.

In any case where there are multiple defendants, the prosecuting attorney peremptorily may challenge a number of jurors equal to the total peremptory challenges allowed all defendants. In case of the consolidation of any indictments, informations or complaints for trial, such consolidated cases shall be considered, for purposes of exercising peremptory challenges, as though the defendants or offenses had been joined in the same indictment, information or complaint.

(D) Manner of exercising peremptory challenges

Peremptory challenges may be exercised after the minimum number of jurors allowed by the rules has been passed for cause and seated on the panel. Peremptory

challenges shall be exercised alternately, with the first challenge exercised by the state. The failure of a party to exercise a peremptory challenge constitutes a waiver of that challenge. If all parties, alternately and in sequence, fail to exercise a peremptory challenge, the joint failure constitutes a waiver of all peremptory challenges.

A prospective juror peremptorily challenged by either party shall be excused and another juror shall be called who shall take the place of the juror excused and be sworn and examined as other jurors. The other party, if he has peremptory challenges remaining, shall be entitled to challenge any juror then seated on the panel.

(E) Challenge to array

The prosecuting attorney or the attorney for the defendant may challenge the array of petit jurors on the ground that it was not selected, drawn or summoned in accordance with law. A challenge to the array shall be made before the examination of the jurors pursuant to subdivision (A) and shall be tried by the court.

No array of petit jurors shall be set aside, nor shall any verdict in any case be set aside because the jury commissioners have returned such jury or any juror in any informal or irregular manner, if in the opinion of the court the irregularity is unimportant and insufficient to vitiate the return.

(F) Alternate jurors

The court may direct that not more than six jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or

are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each party is entitled to one peremptory challenge in addition to those otherwise allowed if one or two alternate jurors are to be impanelled, two peremptory challenges if three or four alternate jurors are to be impanelled, and three peremptory challenges if five or six alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by this rule may not be used against an alternate juror.

(G) Statement of procedure in first degree murder cases

Until January 1, 1974, a defendant charged with first degree murder, except a defendant charged with violation of R.C. 2901.09 or R.C. 2901.10, shall not be entitled to the special venire provided in R.C. 2945.18; shall not be entitled to the number of peremptory challenges in capital cases provided in R.C. 2945.21 or Rule 24 (C); and shall not be entitled to the overnight sequestration provided in R.C. 2945.33.

RULE 30 INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies of such requests

shall be furnished to all other parties at the time of making such requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.

No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.